REMARKS/ARGUMENTS

As a preliminary matter, applicants thank the Examiner for acknowledging applicants' election with traverse of claims 1, 5 and 8-16 that was submitted in the reply filed on July 19, 2007. Applicants acknowledge that claims 1, 5 and 8-16 are the subject of the Office Action dated August 10, 2007. Applicants further thank the Examiner for his consideration of the references listed in the Information Disclosure Statements submitted thus far.

Harold Jensen has been added as a joint inventor on this application under 35 U.S.C. § 116. Declarations and a Power of Attorney are being filed with these papers establishing his status as an inventor. A declaration is also enclosed for first inventor Joseph Paternoster establishing that not naming Harold Jensen was in error and without any deceptive intent.

The Examiner has rejected claims 1, 8-14 and 16 under 35 U.S.C. § 103(a) as being unpatentable over Klentrou et al. (2001) ("Klentrou I") in view of U.S. Patent No. 4,865,640 ("Avera"). The Examiner has also rejected claims 5 and 15 as unpatentable under § 103(a) as being unpatentable over Klentrou I in view of Avera, and in further view of Klentrou et al. (May 2002) ("Klentrou II"). It is respectfully submitted that this rejection cannot stand because neither Klentrou I nor Klentrou II are available as proper § 103(a) references.

A. The Effective Filing Date of the Present Application is October 26, 2001.

The pending application was filed on October 14, 2004; however, it is the National Phase entry of PCT Application No. PCT/US02/34628, filed October 28, 2002, which further claims priority under 35 U.S.C. § 119(e) to U.S. Provisional Patent Application No. 60/345,895, filed on October 26, 2001. Applicants noted this priority claim on the Declaration of Joseph Paternoster that was filed with the pending application. This is also stated on the online Patent Application Information Retrieval service. Therefore, prior art must be considered in light of the effective priority date of October 26, 2001.

The Examiner may contend that the present application may not claim complete priority to the provisional application because it contains disclosure not found in the provisional filing. Applicants respectfully submit that the present application does not differ significantly from Provisional Patent Application No. 60/345,895. As such, the pending application may properly claim an effective priority date of October 26, 2001.

B. Klentrou I Is Not Available As Prior Art Because It Is Not a Section 102(a) or 102(b) Reference.

The effective priority date of the pending application removes the cited references from consideration as prior art. References may only be combined to support a § 103(a) rejection if those references are available as prior art under 35 U.S.C. § 102. Here, neither Klentrou I nor Klentrou II qualify as § 102 references.

35 U.S.C. § 102(b) pertains to publications that disclose the invention more than a year before the date of application for patent in the United States. Klentrou I bears a publication date of March 23, 2001. This date is less than one year prior to the effective filing date of the pending application. As such, Klentrou I is not a § 102(b) reference.

35 U.S.C. § 102(a) pertains to any publications that pre-date the date of invention. Applicant respectfully submits that while Klentrou I may pre-date the effective filing date, it does not pre-date the date of invention. Applicants attach declarations of both inventors to establish that the date of invention precedes Klentrou I's date of publication. Prior to March 23, 2001, both inventors found themselves working in extreme desert heat. (Decl. of Harold Jensen at ¶1; Decl. of Joseph Paternoster at ¶1). Harold Jensen found that DriWater® Hydration Product, when applied to the skin, provided a cooling effect. (Jensen Decl. at ¶2). Joe Paternoster witnessed this discovery and later supervised further experiments with the DriWater® Hydration Product. (Paternoster Decl. at ¶1). Specifically, Joe suggested exploring the use of different amounts of DriWater® Hydration Product to promote the thermoregulatory effect. (Paternoster Decl. at ¶2). Joe and Harold also worked in discovering different ways to apply and wear DriWater® Hydration Product. (Jensen Decl. at ¶3). Joe later commissioned the study that published as Klentrou I. (Paternoster Decl. at ¶4). This study was designed to validate Harold's and Joe's discoveries in a laboratory setting. Attached to Harold's declaration are pictures of Harold in the desert heat (Exh. A of Jensen Decl.) and copies of notes detailing parts of his experiments with the DriWater® Hydration Product as a body coolant (Exhs. B and C of Jensen Decl.). Attached to Joe's declaration is a copy of the agreement describing the study that eventually published as Klentrou I. (Exh. A of Paternoster Decl.). This documentary evidence therefore establishes that the invention was conceived and reduced to practice prior to the publication of Klentrou I. As such, Klentrou I is not available as prior art under § 102(a).

Because Klentrou I is not available as prior art under § 102, it cannot be used in combination with another reference to support a rejection under § 103(a). As such, the

Examiner's rejection of pending claims 1, 8-14 and 16 cannot stand. Applicants request that this rejection be withdrawn and the patent be allowed to issue.

C. Klentrou II Is Not Available As Prior Art Because It Was Published Within a Year of the Effective Filing of Applicant's Patent Application.

Klentrou II bears a publication date of May 2002. This date is after the effective priority date (October 26, 2001) of the present application. As such, Klentrou II is not available as prior art under any subsection of 35 U.S.C. § 102. The rejection of pending claims 5 and 15 as unpatentable under § 103(a) therefore lacks sufficient support and should be withdrawn.

D. Conclusion

In light of Applicants' declaration and documentary evidence, as well as the arguments presented above, Applicants request that the rejection of pending claims 1, 5 and 8-16 be withdrawn, and that a timely Notice of Allowance issue.

Respectfully submitted,
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Dated: February 8, 2008

By: _____
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Attachments:
Rule 131 Declaration and Exhibit A from Joseph Paternoster
Rule 131 Declaration and Exhbits from Harold Jensen